Simon v. Adzilla, Inc [New Media] et al

Doc. 596 Att. 9

EXHIBIT J

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(a) [7:299] Denials upheld

(b) [7:300] Denials reversed

0081. [7:162] **In General:** Intervention is a procedure by which someone not a party to a pending lawsuit can gain party status without the consent of the original parties.Upon compliance with Rule 24 (below), the nonparty may be permitted to "intervene" in the action. Thereafter, the intervenor has full party status, including the right to engage in discovery, to participate at trial, and to appeal the judgment. [See *International Union of Mine, Mill & Smelter Workers v. Eagle–Picher Mining & Smelting Co.* (1945) 325 US 335, 338, 65 S.Ct. 1166, 1167–1168; *Alvarado v. J.C. Penney Co., Inc.* (10th Cir. 1993) 997 F2d 803, 805; *United States v. California Mobile Home Park Mgmt. Co.* (9th Cir. 1997) 107 F3d 1374, 1378 (citing text)]
(Conversely, the intervenor may also be *bound* by an adverse judgment. I.e., res judicata and collateral estoppel apply both ways. *Martin v. Wilks* (1989) 490 US 755, 761–762, 109 S.Ct. 2180, 2184.)
Intervention thus limits the notion that plaintiff is the "master" of his or her lawsuit.

004a. [7:163] **Purpose:** Intervention is designed to accommodate two competing policies: "efficiently administering legal disputes by resolving all related issues in one lawsuit on the one hand, and keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged, on the other hand." [*United States v. Pitney Bowes, Inc.* (2nd Cir. 1994) 25 F3d 66, 70; *Reich v. Webb* (9th Cir. 1964) 336 F2d 153, 160]Consistent with this purpose, "(a)n intervening party may join issue only on a matter that has been brought before the court by another party." [*Edison Elec. Institute v. E.P.A.* (DC Cir. 2004) 391 F3d 1267, 1274 (internal quotes omitted)]

004b. [7:163.1] **Always optional:** Intervention is never mandatory. A person may choose to stay out of litigation, even if it affects his or her interests: "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." [*Chase Nat'l Bank v. City of Norwalk, Ohio* (1934) 291 US 431, 441, 54 S.Ct. 475, 479; see *Goldin v. Bartholow* (5th Cir. 1999) 166 F3d 710, 721—no duty to intervene if plaintiff proceeded against wrong party]004(1) [7:163.2] **Nonparties not bound by judgment:** A person who chooses not to intervene (and is not in privity with any party or member of a represented class) is not bound by a judgment even if he or she *knew* of the lawsuit and could have intervened: "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." [*Martin v. Wilks* (1989) 490 US 755, 763, 109 S.Ct. 2180, 2185]004(a) [7:163.2a] **Compare—employment discrimination claims:** *Martin*, supra, involved an employment discrimination claim. The Civil Rights Act of 1991 overturned *Martin* in the context of such suits. It provides that employees adversely affected by a judgment in such cases may not institute a new action if they had an opportunity to intervene in the earlier case. [42 USC § 2000e–2(n)]

004(2) [7:163.3] **Rationale:** A party seeking a judgment binding on another must *join* that person as a party: "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." [*Martin v. Wilks*, supra, 490 US at 765, 109 S.Ct. at 2186; *United States v. City of Chicago* (7th Cir. 1990) 897 F2d 243, 244]

004(3) [7:163.4] **Effect:** "Sideline sitters" are often better off: If the judgment is adverse to their interest, they can challenge it in fresh litigation. And, if the judgment is favorable, they may be able to utilize it as *collateral estoppel* in later proceedings against the adverse party.Moreover, staying out of the litigation insulates them from liability for costs and fees!

004(4) [7:163.5] **Compare—vicarious liability:** If the "sideline sitter" is vicariously liable for the conduct being litigated (e.g., suit names employee and not employer), it risks losing the opportunity to raise defenses to liability. If permitted by state law, an adverse judgment may be amended to include a nonparty who is vicariously liable for the

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